law. An able and lengthy discussion of the doctrine may also be found in *Smith v. Elliott*, 1 P. & H. 307.

It is well settled that where it is sought to recover payments of usurious interest, and in other cases where the law is for the protection of one of the parties against the other, the doctrine of *in pari delicto* has no application. See *Moseley v. Brown*, 76 Va. 419. In most of the Virginia cases hitherto cited this question is also briefly considered.

In *Gray v. Roberts* (Ky.), 12 Am. Dec. 383, it is held that money paid for lottery tickets may be recovered, when the lottery is prohibited by law, the law being for the protection of the purchasers. Attention is called to the editor's note to this case.

In *Carpenter v. McClure*, 91 Am. Dec. 370, the Supreme Court of Vermont announced the same rule as that laid down in *Harris v. Harris, supra.*

One of the latest adjudications involving the application of the maxim is *Bradtfeldt v. Cook* (Oreg.), 50 Am. St. Rep. 701, wherein *Harris v. Harris, supra,* is cited with approval by the court.

For a good discussion of the rule and its application, see note to *Collins v. Blantern*, 1 Sm. Lead. Cas. (9 Am. ed.) 662. See, also, *Burtners v. Keran*, 24 Gratt. 42, 70; *Barnett v. Barnett*, 83 Va. 508; *Smith v. Chilton*, 84 Va. 840; extensive note, 3 Am. St. Rep. 727.

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THE LIABILITY OF INFANTS FOR TORTS CONNECTED WITH CONTRACTS.

An infant is liable for his torts. "If an infant commit an assault or utter slander," said Lord Kenyon, "God forbid that he should not be answerable for it in a court of justice."

But when the tort is connected with a contract the question becomes more complicated, for an infant's contract is not binding upon him.

The leading case upon the subject is *Vasse v. Smith*, 6 Cranch, 226, s. c. 1 H. & W. Am. Lead. Cases, 293. In this case it was decided, among other things, that—

(1) In an action on the case the declaration shows upon the face that the tort is merely constructive, being in effect but a breach of contract, and a plea of infancy is a bar.

(2) In trover, the liability does not appear from the declaration, and it cannot be told whether the action is brought for a pure tort, or such merely constructive conversion as consists only in a breach of contract, and infancy cannot as a special plea be a bar.

It appears, then, from this case that an infant is not liable when the tort is *in effect but a breach of contract.*

Let us examine the authorities on this point.

"Although an infant is liable for his torts, he is not liable for the tortious consequences of his breach of contract. The tort must be a distinct and substantive wrong in itself to make the infant liable." 10 Am. & Eng. Encyc. Law (1st ed.), 669, and cases cited. See 2 Kent, 241.

"Acts, however aggravated, which merely establish a breach of contract on the part of the infant, manifestly are insufficient." *Moore v. Eastman,* 1 Hun. 578.

"If an infant's wrongful act, though concerned with the subject-matter of the contract, and such that but for the contract there would have been no opportunity of committing it, is, nevertheless, independent of the contract in the sense of not being the act contemplated by it, or being the act expressly forbidden by it, then the infant is liable." 10 Am. & Eng. Encyc. Law (1st ed.), 669, note 4, *citing* Pollock on Contracts, 55.

"If such tort or fraud consists in the breach of contract, then he is not liable therefor in an action sounding in tort, because this would make him liable for his contract, merely by a change in the form of action which the law does not permit. Where the tort, though connected by circumstances with the contract, is still distinguishable from it, there he is liable." 1 Pars. Con. 275. See, also, Chitty Con. 149, n. 3,; 2 Kent, 241; 2 Addis. Torts, 1126; 2 Greenl. on Ev., sec. 368.

"We think the fair result of the American as well as the English cases is, that an infant is liable in an action *ex delicto* for an act of willful fraud only in cases in which the form of action does not suppose that a contract has existed, but that where the *gravemen* of the fraud consists in a transaction which really originated in a contract, infancy is a good defence." *Gilson v. Spear,* 38 Vt. 311.

There are but few authorities *contra.* Among these may be mentioned *Jennings v. Rundell,* 8 T. R. 331; *Wood v. Vance,* 1 N. & McC. 197; *Peigne v. Sutcliffe,* 4 McC. 387; *People v. Kendall,* 25 Wend. 399. And, see *dicta* in *Norris v. Wait,* 2 Rich. 151; and *Evans v. Terry,* 1 Brev. 80, where opinions are expressed that the

plaintiff might maintain an action for the deceit practised on her by the defendant, a minor, in the breach of his promise of marriage. See, also, Tyler Inf. 184, where it is said: "The contract and the fraud in the contract are distinct things, and while not liable for the former, the infant, if *doli capax*, is responsible for the latter."

Manifestly, however, these decisions are erroneous, and directly contrary to the general tenor of the authorities which I have cited.

In *Fitts v. Hall*, 9 N. H. 441, a distinction is suggested of this nature, viz., that an infant is not liable for a fraudulent affirmation which makes a part of the contract, but is liable for fraudulent representations anterior or subsequent to the contract, and not a parcel of it; as, for instance, where he induced a party to contract with him, by fraudulently representing himself to be of age. Tyler on Inf. 184.

But the law is most assuredly otherwise. 1 H. & W. Lead. Ca. 323; 10 Am. & Eng. Encyc. Law (1st ed.), 670; Benj. Sales, 16; 2 Kent, 241; 2 Greenl. Ev., sec. 368.

In *Sims v. Everhardt*, 102 U. S. 300, Strong, J., said: "An estoppel *in pais* is not applicable to infants, and a fraudulent representation of capacity cannot be an equivalent for actual capacity." . . . . . "A contemporaneous declaration of his right, or of his age, adds nothing to what is implied in his deed."

There seems to be a tendency *in equity* to hold an infant liable for fraudulent representations, as to his age, especially where his appearance bears out his assertions. 10 Am. & Eng. Encyc. Law (1st ed.), 670; Benj. Sales, *supra*.

The question of the liability of infants for torts connected with contracts is an open one in Virginia. In *Fry v. Leslie*, 87 Va. 274, Lewis, P., said: "An infant is liable for his tort—that is an injury *not arising out of a breach of contract*—just as an adult is." But this is a *dictum*.

The law on this subject, briefly stated, is, therefore, as follows:

1. To make an infant liable for a tort connected with contract, the tort must be a distinct and substantive wrong in itself.

2. A liability really *ex contractu* cannot be changed into a liability *ex delicto* by altering the form of action, and

3. While there is a tendency *in equity* to hold an infant liable for fraudulent representations as to his age, the doctrine of estoppel is not applicable to infants, and, *at law*, an infant is not liable for such fraudulent representations.

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